

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

DAYLIGHT TRANSPORT, LLC,

Employer,

and

Case No. 31-RC-262633

TEAMSTERS LOCAL 63

Petitioner.

**DAYLIGHT TRANSPORT, LLC’S REQUEST FOR REVIEW OF
REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION AND
REQUEST FOR IMMEDIATE STAY OF MAIL BALLOT ELECTION**

Pursuant to Section 102.67 of the National Labor Relation Board’s Rules and Regulations, Daylight Transport, LLC (“Daylight” or “Company”) requests immediate review of the Decision and Direction of Election (“Decision”) issued by the Regional Director for Region 31 on August 12, 2020, in the above-captioned matter. The following compelling reasons require the National Labor Relations Board (“NLRB” or “Board”) to grant this Request for Review and *to immediately stay the distribution of mail ballots scheduled to commence on August 19, 2020, pursuant to the Decision.*

- The Decision presents a substantial question of law or policy because it presents a departure from officially reported Board precedent. *See S.D. Gas & Elec.*, 325 NLRB 1143 (1998).¹
- A substantial question of law or policy is raised because of the absence of officially reported Board precedent to support the Regional Director’s action that turns solely on the existence of COVID-19 in San Bernardino County generally and gives little weight to the Board’s preference for manual elections and the specific safety conditions at the plant or the implementation of safety measures to protect those involved in the election.

¹ On July 6, 2020, General Counsel Peter B. Rodd issued GC Memorandum 20-10 containing suggested manual election protocols and reiterating that “the Board has ultimate authority to make decision on when, how and in what matter elections are conducted. . . .” *See* GC Memo. 20-10, Attach. 1.

COVID-19 currently represents an understandable and reasonable concern. The instant Request for Review does not seek to gratuitously critique the Regional Director in navigating serious challenges during the current pandemic. At some point, however, the Board must reinstitute and reaffirm its precedents for representation proceedings and overturn a decision mandating mail ballots when the employer demonstrates that COVID-19 risk at a specific facility is minimal, employees in the voting group have continued to report to the facility every day, and the employer will institute all reasonable safety protocols, including those set forth in General Counsel Memorandum 20-10. This election offers that exact scenario.

As established below, the Regional Director abused her discretion by ordering a mail ballot election despite the substantial and effective safety protocols that would allow a safe manual election. The Regional Director's Decision represents an erroneous and unjustified departure from applicable NLRB law and policy and denies employees the right to participate in the NLRB's preferred election method that maximizes voter participation and free choice.

I. STATEMENT OF THE CASE

On July 6, 2020, the International Brotherhood of Teamsters, Local 63 ("Petitioner" or "Union") filed a representation petition to represent 34 employees at the Company's Fontana, California facility. The parties agreed to all terms for a stipulated election² except the issue of manual vs. mail ballots. On August 3, 2020, the parties filed position statements regarding the appropriate election method. The Regional Director would only decide one issue: whether to conduct a manual or mail ballot election.

On August 12, 2020, the Regional Director issued the *Decision and Direction of Election* (see Attach. 2). In the Decision, while the Regional Director recognizes the strong preference for

² The parties agreed that the stipulated number of employees within the unit is approximately 60.

manual ballots, she then decides to order mail ballots on the general conditions of the pandemic then present in San Bernardino County, and that some employees at the Company have tested positive for COVID-19, no, however, noting whether the positive testing was caused at work or through personal and social gathering to which the Company has no control over. Thus, as the Regional Director opines:

Although questions regarding the transmission of SARS-CoV-2 and the nature of COVID-19 abound, the basics of the pandemic from a public health perspective are at this point quite familiar: it is a contagious virus, for which there is currently no approved vaccine or antiviral treatment, that often causes a serious, and at times fatal, illness. I find the COVID-19 pandemic presents extraordinary circumstances that make conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the employees' union representation preferences in light of the current COVID-19 situation in San Bernardino County, as well as the fact there have been and are active cases and exposures amongst the Employer's employees. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election. The Employer's employees remain working at the Employer's facility because they perform essential services, and because of the nature of the work, no alternative exists to perform their work remotely. However, the Board does have an acceptable alternative to conducting a manual election.

Manual election procedures inherently require substantial interaction, and that interaction generates risk. I appreciate the Employer's efforts to mitigate this risk by making certain accommodations in an effort to allow for a degree of social distancing and protection during the election consistent with GC 20-10. I recognize that these accommodations and the GC 20-10 manual election protocols might reduce the risk of transmission, but given the current high incidence of COVID-19 at the locality where the election would take place and the substantial inevitable interaction and potential exposure associated with a manual election, the protocols do not alleviate my concerns about conducting a manual election under the current situation at this locality. In this regard, I find the fact there are employees currently infected with COVID-19 to be significant.

With respect to the inevitable interactions and risk of exposure necessitated by a manual election, voters, observers, and party representatives, as well as the Board agent, would all need to travel to and appear at the Fontana facility to participate in the election. Party representatives, the observers, and the Board agent usually would gather for approximately 15 to 30 minutes for the pre-election conference, including inspection of the voting area, though I recognize that GC 20-10 suggests

that this may could take place by video. More significantly, even though it is an outdoor area, the Board agent and observers would need to share the same area for a period of at least four hours, i.e. the two 2-hour voting periods plus the vote count. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent, although GC 20-10 does suggest the use of multiple voter lists. The Board agent must provide a ballot to each voter, which per GC 20-10 could be done by placing a single ballot on a table, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Given the span of the election, the Board agent and observers might need to use a restroom at the Fontana facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, which is typically done in the same voting area, with the observers, party representatives, and other employees who wish to attend. The vote count, thus, would extend the time that the observers and the Board agent would spend together beyond simply the voting period windows. In addition to the Board agent and observers being exposed to each other for an extended period of time, they also would be exposed, albeit briefly, to many people during the course of conducting the election. Furthermore, the Employer's proposed two separate voting periods, the first starting at 9:00 a.m. and the last ending at 6:00 p.m., raise additional concerns because such an election likely would require the Board agent coming from the Regional Office in West Los Angeles to spend the entire day in a public place in San Bernardino County, further increasing the Board agent's potential exposure to COVID-19.

As noted above, the Employer has incorporated many of the accommodations used to combat the spread of COVID-19 in its plan for a manual election, such as social distancing, the use of plexiglass shields, and face coverings. However, in my view, in light of the current circumstances in San Bernardino County and the fact employees of the Employer are currently infected with COVID-19, the substantial interaction and exposure inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer or suggested by GC 20-10. For example, although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line who might not normally in the course of his work interact with others, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election and potentially unwittingly expose others to the virus. The fact that five of the Employer's employees have tested positive within the last few months, including several who had not yet been able to work at the time briefs in this matter

were submitted, and that ten other employees have been out on COVID-19 related leaves, highlights the fact the risk of exposure to somebody at the Employer's facility with COVID-19 is not just theoretical.

Furthermore, the fact that a large percentage of virus transmission is through pre-symptomatic or asymptomatic carriers exacerbates the risk for all election participants. According to the CDC, the "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic³² and would neither be identified nor have sought testing. Setting aside the observers and Board agent who must remain in the polling area at all times during the voting period, the potential for exposure to COVID-19 from a pre-symptomatic or asymptomatic carrier voter would not be limited to the few minutes that voter would be in the polling area, as a forthcoming study published by the CDC concluded that the COVID-19 virus can survive for several hours in the air and maintain its infectivity. Thus, if a pre-symptomatic or asymptomatic carrier voter entered the polling room and released – through a cough, a sneeze, or simply from speaking – the COVID-19 virus into the air through droplets of saliva, the observers and the Board agent would potentially be exposed to the virus for the remainder of the election and the vote count, and any subsequent voter would likewise be potentially exposed. Although this may be somewhat ameliorated by conducting the voting outdoors, the number of people to whom the observers and the Board agent will be exposed to over an extended period of time still presents significant risk. Further, a manual election would require a Board agent to travel approximately 60 miles at a time when travel is discouraged.

The parties do not disagree as to the number of employees in the petitioned-for unit who have been affected in some way by COVID-19, either by contracting the virus or by exposure to and subsequent quarantine or other required leave. The Employer admits that it is aware of 15 employees so affected, which is about a quarter of the entire 60-person petitioned-for unit. This is not an insignificant percentage of the unit, and, given the documented increase in cases in San Bernardino County and in Fontana in particular, it is not unreasonable to assume that the same or even greater number of employees will continue to be exposed to COVID-19 between now and a manual election and, therefore, be capable of infecting others.

Thus, taken together, I find holding a manual election at the Fontana facility under these circumstances would entail significant risk to all involved. Accordingly, I find this risk constitutes extraordinary circumstances that make a mail ballot election appropriate

(See Attach. 2). While the decision talks generally about COVID-19 and its presence as of August 10 in San Bernardino County,³ the Decision offers little explanation specific to the Employer's plant (where a full complement of employees are and have been working daily during the pandemic), or how the additional safeguards offered by the employer (not only all those provided in the GC's Memorandum, but also providing a covered outdoor tent for further ventilation) fail to suffice to ensure the safety of all involved in this particular election.

Daylight acknowledges that Regional Directors have ordered and the Board has upheld mail ballots over the first few months of the pandemic. *See, e.g., id.; Victory Wine Group, LLC*, Decision and Direction of Election, No. 16-RC-257874, slip op. at 5-7 (Reg'l Dir., Apr. 23, 2020). However, the "extraordinariness" of COVID-19 has significantly diminished — it is part of daily life for employers, employees, unions and Board personnel. Indeed, the world has progressed such that the General Counsel has issued guidelines to conduct manual elections. For eligible voters, all of whom report to the Daylight facility every day, a manual election poses no additional risk.

II. ISSUES

The principal issue in dispute is whether the Regional Director abused her discretion by ordering a mail ballot on the sole basis that COVID-19 exists.

First, the Regional Director's ultimate conclusion that a mail ballot is necessary to avoid physical interactions at the facility is factually and legally erroneous and contrary to NLRB precedent and GC Memorandum 20-10.

Second, it was an error for the Regional Director to order a mail ballot election based, essentially, solely on the unsupported belief that the Company could not implement an election

³ It should be noted that San Bernardino County is a very large county geographically – a total of 20,105 square miles in total. For the sake of comparison, it is larger than Delaware, Rhode Island, New Jersey and Connecticut combined.

procedure that ensured social distancing of six or more feet at all times and would not put workers in harm way of potential exposure.

Accordingly, the NLRB should grant review, vacate the Decision, stay the mail ballot election, and direct the Region to conduct a manual election.

III. BACKGROUND

Daylight's facility at 11160 Elm Avenue, Fontana, California, provides long haul less than truckload services. The facility has continued to operate at normal capacity during the pandemic. All eligible voters report to work on a daily basis and work at the facility for the entire shift. All active eligible voters (but one vacationing employee) are also currently scheduled to work on August 19, 2020, the day the Region will mail ballots.

Notably, the facility functions in accord with all guidelines of the Center for Disease Control ("CDC"). All of the following precautions (and others) are in place at the facility:

- Increased employee-wide communications regarding health and safety protocols;
- Additional cleaning resources and enhanced cleaning schedules to ensure sanitation;
- Additional cleaning supplies and sanitizers across the facility;
- High-touch surfaces repeatedly cleaned;
- Staggered and revised start, break, and lunch periods;
- Seating and/or common areas revised or closed;
- Physical markings on floors to maintain proper social distancing;
- Mandatory adherence to handwashing protocols;
- Provision and mandatory use of face masks; and
- Pre-shift screening procedures.

At least a month has passed since any possible work-related COVID-19 exposures at the facility. The Company has put its facility and employees in a safe position with strict, mandatory protocols.

IV. THE REGIONAL DIRECTOR'S FINDINGS

While recognizing all of the measures the parties could take to ensure that social distancing, limited exposure, and heightened sanitation, the Regional Director directed a mail ballot election.

The Regional Director came to this conclusion even though an election would follow the same safety protocols already in place at the facility, which means, in fact, the existence of an election does not increase potential transmission rates at all because these interactions exist with or without the voters being able to participate in an election that maximizes voter participation.

Moreover, the Regional Director flips years of studies and anecdotal information to state that disenfranchisement is a “greater risk” in a manual election. This logic is flawed, and not supported by any factual data, but mere speculative opinion. These employees have reported to work on a daily basis since the pandemic began; they have adopted and modified their working routines to ensure the utmost safety and precautions to help combat the spread of the infection. Yet, the Regional Director points to temperature checks and quarantine protocol as reasons why an manual election would result in “real” voter disenfranchisement. This logic is unsupported, and unfounded.

Yet, the Decision goes on to concede that mail ballot elections depress employee participation “absent” pandemics, and, yet, still orders a mail ballot election. In essence, this decision runs roughshod over the Act’s charge to protect employee choice by elevating a hypothetical safety risk already faced by employees and for which existing measures are in place and other measures are proposed (fully consistent with the GC Memo. 20-10). Indeed, if the Regional Director sought to protect employee free choice, a manual election would occur because a manual election would not increase employee interaction or proximity or exacerbate COVID-19 concerns.

V. APPLICABLE LEGAL STANDARDS AND ANALYSIS

A. The Regional Director Erred in Ordering a Mail Ballot Election.

The Regional Director’s actions rewrite Board precedent by misapplying the holding of *San Diego Gas & Electric* and the NLRB’s *Casehandling Manual Part Two: Representation*

Proceedings (“*Casehandling Manual*”), section 11301.2 (“Manual or Mail Ballot Election: Determination”). *San Diego Gas & Electric* establishes that Regional Directors should consider mail ballots in at least three situations: scattered voters, scattered schedules, and strike or lockout situations. The Board left open the possibility that other extraordinary circumstances may be relevant to election-type decisions. *S.D. Gas & Elec.*, 325 NLRB at 1145, n.6. Recently, Regional Directors have interpreted the “extraordinary” language to encompass the current COVID-19 pandemic. *See, e.g., Atlas Pacific; Victory Wine*. However, Regional Director decisions have frequently been devoid of any fact-specific analysis and, instead, reliant upon the fact that COVID-19 exists generally, as well as assumptions that employers cannot implement sufficient safety measures to ensure a safe manual election.

The refusal of Regional Directors to analyze unique case-specific factors misapplies Board precedent. Regional Directors should analyze all of the factors that the Board has previously determined inform their discretion: employee free choice of representative, maximum voter participation, supervision of selection of representative, and voter safety at a particular location subject to additional relevant facts.

Board precedent in representation cases rests upon the critical threshold consideration of which method of election best advances employee choice (voter turnout, ease of participation, etc.). Mail or mixed ballot voting only exists when necessary to “enhance the opportunity of all to vote.” *Casehandling Manual*, section 11301.2. *San Diego Gas & Electric* stands for the same: “[e]xtraordinary circumstances” mandating a mail ballot election may occur when the Regional Director “might reasonably conclude that [voters’] opportunity to participate in the election would be maximized by utilizing mail or mixed ballot election methods.” *Id.* at 1145. Specifically, a Regional Director must tie their exercise of discretion, even in cases of extraordinary circumstances, to the Board’s proper role in ensuring employee participation and free choice. *Id.* at 1145 n.10 (“A

Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote.”).

Here, the Regional Director attempts to analyze case-specific factors is unfounded. First, the Regional Director relies on statistics in San Bernardino County, despite the County having a population of over two million people and larger than some states. Second, the Regional Director errs when she relies on two sets of numbers: employees who have tested positive for COVID-19, and those who are out on leave. This analysis is incorrect. In its position statement, Daylight explained that there are people currently out on leave: (1) those quarantined for COVID-19 positive testing; (2) those quarantined awaiting result; and (3) those out on other protected leave like FMLA or Workers’ Compensation. Reliance on these numbers is unfounded because the Regional Director is allowing the minority of employees to negatively impact the outcome of an otherwise safe manual election for the majority of voters. By the time the vote occurs, many of those out on leave could be back to work, based on negative COVID-19 results, or expiration of other protected leave.⁴ Moreover, the Board does not require that “all” employees be able to attend when selecting a date best suited for a manual election. No precedent supports that proposition. Instead, the Board looks at when the majority of employees are scheduled to work and are capable of exercising their right to vote. Denying the majority of employees their right to vote manual is unfounded and the Board must reverse that decision.

B. Mail Ballot Elections Result in Reduced Voter Turnout.

Recent data definitively and empirically demonstrate that mail ballot elections significantly **diminish** turnout. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a

⁴ Further, those on other protected leave still have a right to vote manual, just as any other voter would.

participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs, Inc.*, No. 19-RC-256529 (75% rate). However, from March 14 to June 9, Regional Directors exclusively ordered mail ballot elections and ***nearly 40% of elections had a participation rate of 80% or less***. Indeed, COVID-19-related mail ballots have resulted in a very significant decrease in voter turnout compared to typical manual ballot elections. *See, e.g., Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op* No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846 (52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec'y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%).

Further, in *Fontanini Foods, LLC*, the Regional Director **twice** extended the mail ballot period because of low turnout. *Id.*, No. 13-RC-257636 (Reg'l Dir. June 29, 2020). In that case, the Region commingled ballots and counted on June 17, 2020. After low turnout, the Regional Director extended the initial mail ballot period until July 1, 2020. The Regional Director then extended the period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other issues also arose in that case, including: some employees had to pay to receive the NLRB package, missing ballots, duplicate ballots, and a few employees attempted to contact the NLRB but never heard back about ballot issues. Ultimately, the Region only tallied 216 ballots in that case (despite claiming to have had 227 as of June 29). All of these circumstances raise significant concerns as to the regularity and integrity of the election process — one of the hallmarks of the manual ballot process and its simple, transparent procedures. The Regional Director's decision at best pays lip service to these concerns in noting that, under other circumstances, she would direct a manual election. But this does nothing for the employee voters in this case who are potentially disenfranchised with the Decision.

If voter turnout is of the utmost importance in representation cases, and the Board generally favors manual elections over mail ballot elections, the Board should overturn the instant Decision. Again, here, eligible voters come to work every day. These voters do not work from home. The state does not keep them at home on lockdown. To the contrary, it is undisputed that all voters report to the facility every day. Furthermore, election or no election, they will interact just as much and in just the same fashion. They should receive one the major quintessential protections of the National Labor Relations Act: a manual, secret ballot election.

C. The Regional Director Should Have Assessed Safety Specific to the Circumstances and Precautions at the Company's Facility.

In its position statement, Daylight detailed its commitment to ensure that it complied with all safety protocols outlined GC Memo. 20-10. To avoid any problems regarding air circulation, Daylight further committed to conducting the election in a covered, outdoor venue that provided substantial space for social distancing and ventilation. Complying with all the safety protocols in GC Memo. 20-10 and conducting the election in an outdoor venue with sufficient social distancing, Daylight provided an environment that would allow employees to participate in the optimal voting scenario while doing nothing to increase COVID-19 transmission risk. In terms of safety, no reason existed to deny the request for a manual election.

The Regional Director claimed the election would require voters who do not work together to have to interact, even though they all work together every day in the exact same setting, and the Company provided clear pictures on how employees would not be interacting more than usual based on social distancing protocols. Social distancing procedures are already in place to allow people to come together in a safe manner, and there is no reason to believe they would not be observed while voting, just as they are while working, while on break, and while entering and leaving the facility. The Regional Director also based her decision on the County's statics, yet

fails to hone in on the city in which the facility lies, failing to acknowledge that San Bernardino County is larger than several states combined.⁵ The Board has never based decisions on the mere possibility of future negative circumstances, much less when it is equally plausible a positive possibility exists.

The Regional Director's decision ignored the specific safety situation and protocols at the facility and, instead, overly focused on the general state of the pandemic and hypothetical negative possibilities. At the same time, she gave little consideration to the most important factors that should decide the election method: employee free choice of representative, maximum voter participation, supervision of selection of representative, and voter safety. This was in error.

D. The Decision Violates Current Board Election Jurisprudence and is Inapposite to NLRB General Counsel's Memorandum 20-10.

The Board reactivated election proceedings in an April 17, 2020, announcement entitled "COVID-19 Operational Status," stating, "[c]onsistent with their traditional authority, Regional Directors have discretion as to when, where and if an election can be conducted, in accordance with NLRB precedent." A total of at least four elections were held in-person following the lifting of the election moratorium – there has been no report of any problems with any such election. For example, in Byhalia, Mississippi, Hearthside Food Solutions LLC workers successfully voted in person without issue. *Hearthside Food Solutions LLC*, Case No. 15-RC-258901 (Region 15 June 3, 2020). There, the parties agreed to implement several safety measures, including erecting plexiglass barriers to separate workers, board employees, and election overseers; using disposable pens and pencils;

⁵ In fact, the current published statistics of the Fontana only support roughly 1/10 of the outbreak in San Bernardino County, despite having the second highest testing rates in the County (coming second to San Bernardino). See <https://sbcpd.maps.arcgis.com/apps/opsdashboard/index.html#/44bb35c804c44c8281da6d82ee602dff>

marking off spaces at 10-foot intervals; providing masks and gloves; and separating the entrance and exit so workers would not pass each other.⁶

With the experience of these elections, and the benefit of a variety of health information regarding the pandemic, on July 6, 2020, the Board's General Counsel, Peter B. Robb released GC Memorandum 20-10 on "Suggested Manual Election Protocols." (*See* GC Mem. 2010). GC 20-10 outlines numerous election protocols to ensure a safe election. *Daylight committed to comply with all the procedures listed. The Company went one-step further offering to conduct the election in an open air tent to further decrease any concerns of COVID-19 transmission. The Company will implement every suggestion in the GC Memo practicable, and will work with both the Region and the Petitioner regarding any additional concerns.*

In light of these facts, the Regional Director's actions fail to follow precedent or the guidance of GC Memo. 20-10. Simply put, the Regional Director rejected a manual ballot without any case-specific justification. The false presumption that social distancing cannot occur during an election is insufficient to support the instant Decision. Other Regions have successfully operated manual elections subject to social distancing procedures. *See, e.g. Hearthside Food Solutions LLC*, No. 15-RC-258901. There is no good reason that cannot occur here.

E. The Board Should Issue An Immediate Stay of Mail Ballot Distribution.

The Decision indicates that the Region will distribute mail ballots on August 19, 2020. In order to prevent potential voter confusion and irreparable injury to the election process, the Board should grant review and issue an immediate stay of mail ballots in this case.

⁶ Daylight has offered to do all those things here.

VI. CONCLUSION

The Decision fails to follow established Board precedent, national labor policy, and recent General Counsel guidance. Though Regional Directors have some discretion when determining the manner of elections, mere reference to speculative buzzwords and phrases such as “COVID-19,” “risk of transmission,” “physical interactions,” “serious health concern,” do not justify choosing an election method that depresses voter turnout and impairs employee free choice. Any decision to use a mail ballot must assess the facts and concerns specific to the election at-hand – which was not done here. For all such reasons, Daylight respectfully requests that the Board grant review, vacate the instant Decision, stay the mail ballot election, and order a manual ballot election.

Respectfully submitted:

/s/ Daniel A. Adlong

Daniel Adlong

OGLETREE, DEAKINS, NASH,

SMOAK & STEWART, P.C.

695 Town Center Drive, Fifteenth Floor

Costa Mesa, CA 92626

Phone: 714-686-0638

daniel.adlong@ogletree.com

CERTIFICATE OF SERVICE

The undersigned certifies that on the 13th day of August, 2020, the above and foregoing document was served filed via the NLRB's electronic filing portal and served by electronic mail to the following:

Mori Rubin, Regional Director
National Labor Relations Board
Region 31
11500 W Olympic Blvd., Suite 600
Mori.Rubin@nlrb.gov

Raquel A. Ortega
Hayes, Ortega & Sanchez, LLP
3625 Ruffin Road, Suite 300
San Diego, California 92123
Tel. 408-209-8028
rao@sdlaborlaw.com

/s/ Daniel A. Adlong
Daniel Adlong

Attachment 1

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-10

July 6, 2020

TO: All Regional Directors, Officers-in Charge, and Resident Officers

FROM: Peter B. Robb, General Counsel

SUBJECT: Suggested Manual Election Protocols

After discussions with Regional Directors, the NLRB Division of Operations-Management, NLRB COVID-19 Task Force Members and our internal union, we are releasing the following suggested manual election protocols. These suggested protocols were developed collaboratively in an effort to determine how best to conduct manual elections safely and efficiently in this unprecedented environment. The Regional Directors have authority delegated by the Board to make initial decisions about when, how, and in what manner all elections are conducted. They have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality. We recognize that the Board has the ultimate authority to make decisions on when, how and in what manner elections are conducted, whether on review of Regional Director decisions or through other guidance or rules.

SUGGESTED MANUAL ELECTION PROTOCOLS

1. Election Mechanics

- A. Polling times procedures for releasing voters must be sufficient to accommodate social distancing/cleaning requirements, without endangering participants by unnecessarily elongating exposure among Board Agents and observers.
- B. Any election agreement or Direction of Election should specify:
 - The maximum number of representatives for each party who can attend the pre-election conference and the ballot count;
 - Whether there will be a voter release schedule to ensure that voters are not crowded, depending on circumstances of the election;
 - The number of voter lists; and
 - The number of observers per party during the election, which should be limited to one each where feasible.
- C. Only one voter will approach the observers' table(s) and election booth(s) at a time to ensure social distancing.
- D. After clearance by the observers, the Board Agent will place an individual ballot on table for the voter and then step back to maintain social distance.

- E. Voting will include use of newer cardboard booths, if available, which are easier to keep clean than the older aluminum booth. The Board Agent will disinfect the booth before it is brought back into the NLRB office and before any other employees handle it.
- F. If more than one booth is used, booths must be more than six feet apart.

2. Certifications required:

- A. No earlier than 48 hours before the election but no later than 24 hours before the election, the employer must (Attachment A):
 - Certify in writing that the polling area is consistently cleaned in conformity with established CDC hygienic and safety standards;
 - Certify in writing how many individuals have been present in the facility within the preceding 14 days, who:
 - have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days;
 - are awaiting results of a COVID-19 test;
 - are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, or shortness of breath; or
 - have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).
- B. If the above certifications are not timely provided, the Regional Director or designee (i.e. manager or supervisory employee) has the discretion to cancel the election.
- C. Based on the certifications, the Regional Director will consider whether the election should be held as scheduled.
- D. Each party, party representative and observer participating at the pre-election conference, serving as an election observer, or participating in the ballot count, must certify in writing that, within the preceding 14 days (Attachment B):
 - They have not tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days;
 - They are not awaiting results of a COVID-19 test; or
 - They have not had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).
 - Individuals who do not provide such certifications will not be permitted to be physically present at the pre-election conference, to serve as an observer, or at the ballot count.
 - Individuals who are not a party, party representative or an observer, must stay at least 15 feet away from the Board Agent at the pre-election conference or the ballot count.

3. All parties must agree in writing to notify the Regional Director, within 14 days after the day of the election, if any individuals who were present in the facility on the day of the election:

- have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days;
- are awaiting results of a COVID-19 test;
- are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, shortness of breath; or
- have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who are awaiting test results for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).

4. Election Arrangements to Be Included in Election Agreement

- A. Spacious polling area, sufficient to accommodate six-foot distancing, which should be marked on the floor with tape to insure separation for observers, Board Agent, and voters.
- B. Separate entrance and exit for voters, with markings to depict safe traffic flow throughout polling area.
- C. Separate tables spaced six feet apart so Board Agent, observers, ballot booth and ballot box are at least six feet apart.
- D. The Employer will provide markings on the floor to remind/enforce social distancing.
- E. The Employer will provide sufficient disposable pencils without erasers for each voter to mark their ballot.
- F. The Employer will provide glue sticks or tape to seal challenge ballot envelopes.
- G. The Employer will provide plexiglass barriers of sufficient size to protect the observers and Board Agent to separate observers and the Board Agent from voters and each other, pre-election conference and ballot count attendees, as well as masks, hand sanitizer, gloves and wipes for observers.
- H. The Agency will provide to the Board Agent(s) running the election a face shield, mask, disposable clothes covering if requested, hand sanitizer, gloves and disinfecting wipes.
- I. An inspection of the polling area will be conducted by video conference at least 24 hours prior to the election so that the Board Agent and parties can view the polling area.
- J. In accordance with CDC guidance, all voters, observers, party representatives, and other participants should wear CDC-conforming masks in all phases of the election, including the pre-election conference, in the polling area or while observing the count. Signs will be posted in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives and other participants of this requirement.

Election Agreements and DDEs must include the details set forth above. Rather than including a lengthy narrative description of safety measures directly on the Notice of Election (“NOE”) the NOE must affirm that appropriate safety measures will be enforced prior to and during the election and subsequent count.

Procedures for Assignment of Manual Elections:

- A. Regional Directors are encouraged to assign the election to Board Agents who have volunteered to run the election.

5. Elections Requiring Travel

- A. The Agency will supply the Agent with hand sanitizer, gloves and disinfecting wipes to clean the car throughout the trip and pumping gas. See [CDC guidelines for pumping gas¹](#).
- B. Concerns regarding hotel arrangements and travel via air will be handled at the Regional level. Guidance on cleaning measures undertaken by various hotel chains can be found on [FedRooms](#).
- C. Board Agents who want to use taxis or private vehicles to travel to and from local elections, even if reachable by mass transit, must secure approval from the Regional Director in advance of the election.

Finally, although we appreciate the effort of all who have assisted in developing these Suggested Guidelines, we recognize that the COVID-19 pandemic is still evolving and that circumstances can change. In the end, the decisions on election procedures and the safety of all participating in an election remain in the sound discretion of the Regional Director.

/s/

P.B.R.

Attachments

¹ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>

Case Name: _____

Case Number: _____

CERTIFICATIONS*

The polling area is consistently cleaned in conformity with established CDC hygienic and safety standards

_____ Yes _____ No

Within the preceding 14 days, the number of individuals have been present in the facility who:

Have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days	
Are awaiting results of a COVID-19 test	
Are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, or shortness of breath	
Have had contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested)	

By: _____

Title: _____

Date: _____

* Must be submitted to the Regional Director no earlier than 48 hours before the election but no later than 24 hours before the election. If the certification is not timely provided, the Regional Director or designee has the discretion to cancel the election.

Case Name: _____

Case Number: _____

CERTIFICATIONS*

Within the preceding 14 days, the individual named below (please initial below):

Has not tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days	
Is not awaiting results of a COVID-19 test	
Is not exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, or shortness of breath	
Has not had contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who is awaiting test results for COVID-19 or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested)	

By: _____

Title: _____

Date: _____

* Must be submitted to the Board agent in order to participate in the pre-election conference or at the ballot count or serve as an observer.

Attachment 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

DAYLIGHT TRANSPORT, LLC¹

Employer

and

Case 31-RC-262633

TEAMSTERS LOCAL 63

Petitioner

DECISION AND DIRECTION OF ELECTION

On July 6, 2020,² Teamsters Local 63 (Petitioner or Union) filed a petition under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent certain employees of Daylight Transport, LLC (Employer). After the Region issued a Notice of Hearing, the parties waived their right to a hearing before a Hearing Officer and entered into a Stipulation of Record for Pre-Election Hearing (Stipulation) on July 23, 2020, which I approved the same day. The petitioned-for unit was clarified in the Stipulation to include all full-time and regular part-time dockworkers, quality coordinators, yard hostlers, and dock trainers employed by the Employer at its Fontana, California facility. There are approximately 60 employees in the petitioned-for unit.

The only issue left unresolved by the Stipulation is whether the election should be held manually at the Employer's facility or by mail ballot, considering the continuing COVID-19 pandemic.³ The parties agreed, as part of the Stipulation, that they would each file their respective statements of position on this issue, and that the party proposing a manual election would, in addition to providing its argument on whether a manual election could be safely held, also provide a detailed description of the proposed election arrangements, including the location, size and layout of the room, ingress and egress, and ventilation. The manual election proponent would also explain how its arrangements would comply with the recommended protocols described in General Counsel Memorandum 20-10 (GC 20-10), and would provide statistics as to the number of its employees who have tested positive, exhibited symptoms, or been quarantined because of the current COVID-19 pandemic. In this case, the Employer is requesting that a manual election be held at its Fontana, California facility and argues that it can be held safely utilizing the protocols it has proposed for the setup and conduct of the election in an outdoor area. The Petitioner asserts that a mail-ballot election is appropriate but also proposes certain safety protocols to be followed in the event that a manual election is ordered.

¹ In the Stipulation of Record for Pre-Election Hearing (Stipulation) noted herein, the parties agreed to amend all formal documents to correct the name of the Employer as captioned herein, and I approved that amendment as part of the Stipulation.

² All dates hereinafter are in 2020 unless otherwise noted.

³ Throughout this decision, the terms "COVID-19," "coronavirus," and "virus" are used interchangeably.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, and the extraordinary circumstances of a pandemic, for the reasons described more fully below, I shall direct a mail-ballot election commencing on the earliest practicable date.

I. FACTUAL OVERVIEW AND POSITIONS OF THE PARTIES

A. The COVID-19 Pandemic in the United States

On March 13, President Donald J. Trump issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.”⁴ The impact of the COVID-19 pandemic on daily life has been profound. The Centers for Disease Control and Prevention (CDC),⁵ an agency of the United States government, has determined “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and “[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.”⁶ According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.” *How COVID-19 Spreads*.⁷ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people. *How to Protect Yourself & Others*.⁸

The CDC has also published reports regarding pre-symptomatic and asymptomatic transmission of COVID-19, including the *Emerging Infectious Disease Journal* (Online Report) for July, “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic.”⁹ The Online Report emphasizes, “transmission in the absence of symptoms reinforces the value of measures that prevent the

⁴ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed August 9, 2020).

⁵ I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (last accessed August 9, 2020).

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed August 9, 2020); “Predicting the Decay of SARS-CoV-2 in Airborne Particles.” <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed August 9, 2020).

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed August 9, 2020).

⁸ *Ibid.*

⁹ See https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (last accessed August 9, 2020). See also, “The implications of silent transmission for the control of COVID-19 outbreaks.” *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> (“even if all symptomatic cases are isolated, a vast outbreak may nonetheless unfold ... we found that the pre-symptomatic stage and asymptomatic infections account for 48% and 3.4% of transmission, respectively”). This article was subsequently updated on July 28, 2020 to observe that, based on current data, that “silent transmission during pre-symptomatic and asymptomatic stages are responsible for more than 50%” of infections.

spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious.” Despite these unprecedented efforts to limit transmission, as of August 10, over 5 million people in the United States have been infected with COVID-19 and 161,842 people have died.¹⁰

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”¹¹ The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes,” but “it is unlikely to be spread from domestic or international mail, products or packaging.” *Am I at risk for COVID-19 from mail, packages, or products?*¹² To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.” *Running Errands.*¹³

B. The COVID-19 Pandemic in California and San Bernardino County

Many state and municipal governments have issued restrictions responsive to the COVID-19 pandemic tailored to the particular circumstances present in specific communities. On March 4, the Governor of the State of California (Governor) declared a “State of Emergency to Help State Prepare for Broader Spread of COVID-19.”¹⁴ On March 19, the Governor issued Executive Order N-33-20 ordering all individuals living in the State of California (California) to stay home, except as to maintain continuity of operations for the Federal Critical Infrastructure Sectors.

On May 4, the Governor issued a press release¹⁵ announcing that based on California’s progress in meeting metrics tied to indicators, California could begin to move into Stage 2 of modifying Executive Order N-33-20 on May 8, with guidelines released on May 7. In doing so, the Governor noted that the situation is “still dangerous and poses a significant public health

¹⁰ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”) (last accessed August 9, 2020). See also Governor of the State of California Executive Order N-64-20, <https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”) (last accessed August 9, 2020).

¹² See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (updated August 4, 2020; last accessed August 9, 2020).

¹³ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (updated August 3, 2020; last accessed August 9, 2020).

¹⁴ See <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/> (last accessed August 9, 2020).

¹⁵ See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/> (last accessed August 9, 2020).

risk.” The Governor further announced that while California would be moving from Stage 1 to Stage 2, its “counties can choose to continue more restrictive measures in place based on their local conditions, and the state expects some counties to keep their more robust stay at home orders in place beyond May 8, 2020.” Ibid. Despite these measures, however, reported cases of COVID-19 have continued to climb in California to its current level of 561,911 cases and 10,359 deaths as of August 10.¹⁶

The California Department of Public Health (CDPH) monitors data related to COVID-19 for each of California’s 58 counties, including San Bernardino County where the Fontana facility is located. If a county does not remain below established thresholds for a seven-day average for positive cases per day, elevated disease transmission, increasing hospitalization, and limited hospital capacity, it is placed on the County Monitoring List, which is then used to reinstitute health measures such as closing business sectors and restricting gatherings and travel.

On July 2, the Governor ordered 19 counties (Health Officer Orders), including San Bernardino County, that had been on the County Monitoring List for three consecutive days to “close all bars, pubs, brewpubs, and breweries, whether operating indoors or outdoors” and cease indoor services for restaurants, wineries and tasting rooms, family entertainment centers and movie theaters, zoos, museums, and cardrooms.¹⁷ The Health Officer Orders also noted, “[p]ublic health studies have shown that the risk of transmission is exacerbated in indoor spaces, particularly when lacking appropriate ventilation.”

On July 13, after 29 counties, including San Bernardino County, had remained on the County Monitoring List for at least three consecutive days, the Governor expanded the restrictions from the previous Health Officer Orders to the rest of the state and reinstated additional closures for San Bernardino County and others on the County Monitoring List to include the indoor operations of gyms and fitness centers, places of worship, indoor protests, offices for Non-Critical Infrastructure Sectors, personal care services (including nail salons, massage parlors, and tattoo parlors), hair salons and barbershops, and malls.¹⁸ As of August 10, San Bernardino County remained on the County Monitoring List, failing to meet the thresholds for elevated disease transmission and increasing hospitalization.¹⁹ According to CDPH, San Bernardino County is “experiencing elevated disease transmission and increasing hospitalizations,” which the CDPH attributes to “1) community transmission from gatherings, 2) *workplace transmission*, 3) transmissions at state prison, state hospital, county jails and academy, and skilled nursing facilities, 4) transfer of patients from Imperial County.”²⁰ (emphasis added).

Although communities nationwide have taken steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout

¹⁶ <https://www.Covid19.CA.Gov>.

¹⁷ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Order%20Closing%20Indoor%20Services%20and%20Sectors-San%20Bernardino.pdf> (last accessed August 9, 2020).

¹⁸ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf> (last accessed August 9, 2020).

¹⁹ See <https://covid19.ca.gov/roadmap-counties/> (last accessed August 10, 2020).

²⁰ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx> (last accessed August 9, 2020).

the United States. As of August 10, according to data released by the San Bernardino County Department of Public Health, there were 36,072 confirmed cases of COVID-19 in San Bernardino County and 546 people have died from COVID-19.²¹ In fact, as of August 10, San Bernardino County had the fourth highest total number positive cases and the fifth highest total number of deaths among the 58 counties in California.²² In the City of Fontana, where the Employer's facility is located, the number of confirmed positive COVID-19 cases as of August 10 was 4,687, with 58 deaths.²³

C. The Employer's Position on a Manual Election and Suggested Safety Protocols

The Employer is a less-than-truckload (LTL) carrier of general freight operating out of Fontana in San Bernardino County, California. The Employer stated in its Statement of Position that the employees in the petitioned-for unit (the Unit) work one of two shifts: a morning/early afternoon shift for inbound freight, and an early afternoon/overnight shift for outbound freight. The facility in Fontana contains two large outdoor areas: a Trailer Staging Area (Staging Area) consisting of about 15,000 square feet, and a Trailer Staging Entrance (Entrance Area) of about 7,000 square feet.

The Employer argues that the Board traditionally favors manual elections, and that this case does not present the "unusual circumstances" that would warrant deviating from a manual election.²⁴ Moreover, the Employer asserts that an on-site election, as opposed to a mail-ballot election, would create a greater percentage of employee participation than a mail ballot election and cites a number recent mail-ballot elections to support this assertion. Moreover, according to the Employer, manual elections best preserve laboratory conditions and myriad problems that might result from the absence of direct Board supervision in a mail-ballot election.

The Employer further argues that none of the limited circumstances described in *San Diego Gas & Electric*, 325 NLRB 1143 (1998) that would warrant the use of mail ballots are present, in that the employees in the petitioned-for unit are not scattered and there is no lockout or picketing at the Employer's facility. The COVID-19 pandemic in and of itself does not justify deviating from the Board's long-standing practice of holding manual elections, since precautions such as those described in GC 20-10 can be taken to ensure a safe and fair election. Furthermore, voting in person will not subject employees to any greater health risk than they presently face at work.

Based upon the foregoing arguments, the Employer proposes a manual election to be conducted at the Employer's facility using either of the large outdoor locations described above. The Employer argues that an open-air polling place provides an ideal setting for the election and that all Unit employees will have access. Moreover, according to the Employer, the area can be

²¹ See <https://sbccovid19.com/>.

²² See https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no.

²³ See <https://www.fontana.org/3272/Coronavirus-COVID-19>.

²⁴ *NLRB Casehandling Manual* Section 11301.5; *Outline of Law and Procedure in Representation Cases* Section 22-110.

staged with multiple tables and outdoor canopies to ensure a “touchless election” where the Board agent will not have to touch or be within 6 feet of a voter.

Specifically, the Employer proposed the following arrangements for the manual election:

- A marked-off walkway with cones separated every 10 feet to ensure social distancing;
- A table and canopy for each observer separated by 10 feet that would allow voters to remain 6 feet away from the observers and the Board Agent;
- A table and canopy for the Board Agent to place a ballot before each voter;
- A canopy for the voting booth located at least 10 feet from the other tables;
- A table and canopy for the ballot box located at least 10 feet from the other tables and the voting booth;
- Plexiglass dividers at each location; and
- Exit from the polling place with appropriate social distancing.

Moreover, according to the Employer, either outdoor voting location set-up as described above would allow up to 20 voters to wait in line while socially distancing or even 30.²⁵

The Employer states that it regularly takes safety precautions including heightening cleaning (including a sanitizing of the entire premises every third weekend), and also performs daily temperature checks on its employees and provides them with gloves, masks, and hand sanitizer. In addition to these every-day practices and the arrangements proposed above, the Employer asserts that it will also meet all the recommended protocols in GC 20-10.

The Employer admits that during the past three months, five of its employees have tested positive for COVID-19, two of whom still remain out and three of whom have been cleared by a doctor to return to work as of the date of this Order. In addition, 10 other employees have been out on COVID-19 related leaves even though they have not tested positive for the virus, and another 9 employees who have not tested positive are currently out on “some sort of protected leave.” The Employer estimates that there are currently about 60 employees in the petitioned-for Unit.

The Employer requests that a manual ballot election be held on August 13, 2020, from 9:00 a.m. to 11:00 a.m. and from 4:00 p.m. to 6:00 p.m. in one of its two outdoor locations utilizing the safety protocols described above.

D. The Petitioner’s Position

The Petitioner argues that given the current COVID-19 numbers in California, and particularly in the city of Fontana where the Employer’s facility is located, a mail ballot election would provide the maximum safety for all involved.

²⁵ In addition to this narrative description, the Employer provided photographs showing the proposed set-up. The photos show a long line of orange cones down what appears to be a long driveway, within which voters could line up while maintaining social distancing, as well as the open-side canopies covering the two tables for the observers, the table to the Board agent and ballots, and the table with the voting booth directly across the driveway from the Board agent.

In the event that a manual election is ordered, the Petitioner agrees on most if not all of the safety protocols proposed by the Employer, including holding the election outdoors in the Trailer Staging Area that would allow for 6-foot distancing between observers, Board agents, and voters. The Petitioner states that it also agrees that voters would have separate ingress and egress to the voting area, which itself would have separate tables 6 feet apart for the Observers, Board agents, ballot box, and voting booth. No more than 5 voters would be allowed in the voting area at any time, with additional employees waiting to vote lined up 6 feet apart outside the voting area consistent with the floor markings. Given these arrangements, according to the Petitioner, no voter release schedule would be required.

The Petitioner also suggests that other materials would be required to ensure a safe manual election, including disposable pencils, glue stick or tape to seal envelopes, plexiglass barriers, and sufficient masks, gloves, wipes, and hand sanitizer for all parties. Plexiglass barriers should also be provided to separate the parties from one another. Observers should be limited to one per party. With regard to the pre-election conference and the ballot count, the Petitioner proposes that no more than two representatives of each party be present.

Notwithstanding the preceding precautions, the Petitioner's position is that a mail ballot election would be more appropriate given the extraordinary circumstances presented by the COVID-19 pandemic, and particularly given the current state of infection in San Bernardino County and specifically in the city of Fontana. Moreover, the Petitioner argues that the risk of COVID-19 spread is increased the more closely a person interacts with others and the longer that interaction is. Thus, a mail-ballot election would eliminate the risk to the Board agent and election observers, who presumably spend the most time in the polling area and are exposed to the greatest number of people throughout the course of the day.

In further support of its argument for a mail ballot election, the Petitioner argues that it would comply with the State's most recent stay-at-home directives limiting gatherings of people from multiple households in an indoor or outdoor place. Moreover, a mail ballot election would allow employees in the petitioned-for Unit to vote if they are ill or otherwise absent from work because of COVID-19.

The Petitioner requests that a mail ballot election be ordered and commence not later than August 20.²⁶

II. AGENCY DIRECTIVES AND LEGAL AUTHORITY

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees' union representation preference and to certify the results of such elections. The Board's obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. Regional Directors have an obligation

²⁶ Although the Petitioner suggests certain safety protocols in the event that a manual election is ordered, the Petitioner does not propose a date or time for such an election.

to appropriately exercise their discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic.

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has acknowledged that circumstances may necessitate adaptations on the Board's part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that "circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions." 120 NLRB at 1346, citing *Shipowners' Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, "[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted." *Id.*; see also *NLRB Casehandling Manual (Part Two) Representation Procedures* Sec. 11301.2 (Casehandling Manual).²⁷ Thus, "[o]nly where it is affirmatively shown that a Regional Director has clearly abused the discretion afforded him [or her] to conduct representative elections will the Board nullify an election and prescribe other election standards." *National Van Lines*, 120 NLRB at 1346.

The Board has determined that there are some instances in which a mail ballot election is appropriate because "of circumstances that would tend to make it difficult for eligible employees to vote in a manual election." *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Board has clarified that Regional Directors should consider, at a minimum, where employees are located geographically, if employees are temporarily scattered, whether there is an ongoing strike, lockout, or picketing, and the ability of voters to read and understand a mail ballot. *Id.* at 1145. The Board went on to say that there may be other relevant factors to consider and that "extraordinary circumstances" may warrant a departure from the specific guidelines articulated in that case. *Id.*

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, a Regional Director may exercise discretion to order a mail ballot election where conducting an election manually is not feasible and, under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. In addressing the COVID-19 pandemic, the Board has recognized the discretion afforded to Regional Directors in election matters. In this regard, when the Board issued an announcement titled "COVID-19 Operational Status"²⁸ on April 17 regarding the COVID-19 pandemic, it stated in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in

²⁷ I note the provisions of the *Casehandling Manual* are not binding procedural rules; the *Casehandling Manual* is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994)); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988); *Aaron Medical Transportation, Inc.*, 2013 WL 6673598 (2013) (unpublished) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007)); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

²⁸ See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

On July 6, General Counsel Peter Robb issued a memorandum titled “Suggested Manual Election Protocols.” (GC 20-10). In that memorandum, the General Counsel acknowledges that the protocols suggested therein are not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation, and he reiterates that Regional Directors have the authority, delegated by the Board, to make “initial decisions about when, how, and in what manner all elections are conducted.” The General Counsel further notes Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

Among other suggestions in GC 20-10, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, come into contact with someone who tested positive within the preceding 14 days, are not awaiting test results, and are not exhibiting COVID-19 symptoms. GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay resolution of the question concerning representation.

I note that the Board has denied review of Regional Directors’ decisions to conduct mail ballot elections due to local COVID-19 circumstances although employers have offered to follow the same or similar protocols as those identified in GC 20-10. See, for example, *Johnson Controls, Inc.*, Case 16-RC-256972 (Order dated May 18, 2020) (denying review where employer had zero COVID-19 cases, daily screened all individuals accessing the facility for symptoms, mandated face coverings and social distancing, and offered an outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves).²⁹ Recently, on July 14, the Board, in an Order denying a request for review in *Brink’s Global Services USA, Inc.*, Case 29-RC-260969, addressed a mail ballot determination in the context of the COVID-19 pandemic and with consideration of GC 20-10. In footnote 2 to that Order, the Board found the COVID-19 pandemic to be “extraordinary circumstances” as contemplated by *San Diego Gas*. With respect to GC 20-10, the Board did not formally adopt its guidance, noting only the following: “The Board will continue to consider whether manual elections should be directed based on the circumstances then prevailing in the region charged

²⁹ The Regional Director’s Decision and Direction of Election, dated May 7, 2020, and the Board’s May 18, 2020 Order are available on the Board’s public website at <https://www.nlr.gov/case/16-RC-256972>.

with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.”³⁰

III. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Whether a mail ballot election is appropriate requires considering in each case both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. I recognize that the Board has traditionally preferred manual elections. However, I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety concerns in the context of a pandemic. Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

I acknowledge that absent the public health concerns arising from the pandemic, I likely would order a manual election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. I recognize a limited degree of reopening has begun, in the United States generally and in California specifically. I also recognize that in San Bernardino County, not only does COVID-19 remain present in the local community, but an ongoing surge in confirmed cases presents a significant health risk. As noted above, current Federal, State, and San Bernardino County public health guidance strongly recommends discouraging gatherings to reduce the risk of exposure to and spread of COVID-19, and a mail ballot election minimizes such risk.

Thus, based on the facts outlined above and for the reasons detailed below, I find that it is appropriate to direct a mail ballot election in this case because: the current pandemic conditions constitute extraordinary circumstances that merit deviation from a manual election; a mail ballot election is the safest method of conducting an election under the circumstances; and, in comparison to a manual election, a mail ballot election avoids disenfranchising voters due to the pandemic.

A. The Risks Associated With the COVID-19 Pandemic Constitute Extraordinary Circumstances

Although questions regarding the transmission of SARS-CoV-2 and the nature of COVID-19 abound, the basics of the pandemic from a public health perspective are at this point quite familiar: it is a contagious virus, for which there is currently no approved vaccine or antiviral treatment, that often causes a serious, and at times fatal, illness. I find the COVID-19 pandemic presents extraordinary circumstances that make conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the employees’ union representation preferences in light of the current COVID-19 situation in San Bernardino County, as well as the fact there have been and are active cases and exposures amongst the Employer’s employees. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election. The Employer’s employees remain working

³⁰ The Order is available on the Board’s public website at <https://www.nlr.gov/case/29-RC-260969>.

at the Employer's facility because they perform essential services, and because of the nature of the work, no alternative exists to perform their work remotely. However, the Board does have an acceptable alternative to conducting a manual election.

Manual election procedures inherently require substantial interaction, and that interaction generates risk. I appreciate the Employer's efforts to mitigate this risk by making certain accommodations in an effort to allow for a degree of social distancing and protection during the election consistent with GC 20-10. I recognize that these accommodations and the GC 20-10 manual election protocols might reduce the risk of transmission, but given the current high incidence of COVID-19 at the locality where the election would take place and the substantial inevitable interaction and potential exposure associated with a manual election, the protocols do not alleviate my concerns about conducting a manual election under the current situation at this locality. In this regard, I find the fact there are employees currently infected with COVID-19 to be significant.

With respect to the inevitable interactions and risk of exposure necessitated by a manual election, voters, observers, and party representatives, as well as the Board agent, would all need to travel to and appear at the Fontana facility to participate in the election. Party representatives, the observers, and the Board agent usually would gather for approximately 15 to 30 minutes for the pre-election conference, including inspection of the voting area, though I recognize that GC 20-10 suggests that this may could take place by video. More significantly, even though it is an outdoor area, the Board agent and observers would need to share the same area for a period of at least four hours, i.e. the two 2-hour voting periods plus the vote count. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent, although GC 20-10 does suggest the use of multiple voter lists. The Board agent must provide a ballot to each voter, which per GC 20-10 could be done by placing a single ballot on a table, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Given the span of the election, the Board agent and observers might need to use a restroom at the Fontana facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, which is typically done in the same voting area, with the observers, party representatives, and other employees who wish to attend. The vote count, thus, would extend the time that the observers and the Board agent would spend together beyond simply the voting period windows. In addition to the Board agent and observers being exposed to each other for an extended period of time, they also would be exposed, albeit briefly, to many people during the course of conducting the election. Furthermore, the Employer's proposed two separate voting periods, the first starting at 9:00 a.m. and the last ending at 6:00 p.m., raise additional concerns because such an election likely would require the Board agent coming from the Regional Office in West Los Angeles to spend the entire day in a public place in San Bernardino County, further increasing the Board agent's potential exposure to COVID-19.³¹

³¹ I also note that the Mayor of the City of Los Angeles issued a new order on August 7, 2020 requiring residents of the City of Los Angeles to remain at home, with some exceptions (August 7, 2020 Order); see "[Public Order Under City of Los Angeles Emergency Authority](#)" (revised August 7, 2020; last accessed August 9, 2020). Although a

As noted above, the Employer has incorporated many of the accommodations used to combat the spread of COVID-19 in its plan for a manual election, such as social distancing, the use of plexiglass shields, and face coverings. However, in my view, in light of the current circumstances in San Bernardino County and the fact employees of the Employer are currently infected with COVID-19, the substantial interaction and exposure inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer or suggested by GC 20-10. For example, although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line who might not normally in the course of his work interact with others, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election and potentially unwittingly expose others to the virus. The fact that five of the Employer's employees have tested positive within the last few months, including several who had not yet been able to work at the time briefs in this matter were submitted, and that ten other employees have been out on COVID-19 related leaves, highlights the fact the risk of exposure to somebody at the Employer's facility with COVID-19 is not just theoretical.

Furthermore, the fact that a large percentage of virus transmission is through pre-symptomatic or asymptomatic carriers exacerbates the risk for all election participants. According to the CDC, the "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic³² and would neither be identified nor have sought testing. Setting aside the observers and Board agent who must remain in the polling area at all times during the voting period, the potential for exposure to COVID-19 from a pre-symptomatic or asymptomatic carrier voter would not be limited to the few minutes that voter would be in the polling area, as a forthcoming study published by the CDC concluded that the COVID-19 virus can survive for several hours in the air and maintain its infectivity.³³ Thus, if a pre-symptomatic or asymptomatic carrier voter entered the polling room and released – through a cough, a sneeze, or simply from speaking – the COVID-19 virus into the air through droplets of saliva, the observers and the Board agent would

Board agent traveling from the City of Los Angeles to Fontana to conduct the election would not necessarily violate the August 7, 2020 Order, I do note that a Board agent traveling from Los Angeles for the election (including – as noted above – having to spend a large part of the day in some public place in San Bernardino County) would be counter to the August 7, 2020 Order's directive that "Angelenos must minimize contact with others as much as possible," insofar as it is possible here to eliminate such contact by conducting a mail ballot election.

³² "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last accessed August 9, 2020). See also "Temporal dynamics in viral shedding and transmissibility of COVID-19" (April 15, 2020). *Nature*. <https://www.nature.com/articles/s41591-020-0869-5> ("We estimated that 44% ... of secondary cases were infected during the index cases' presymptomatic stage ...")

³³ "Persistence of Severe Acute Respiratory Syndrome Coronavirus 2 in Aerosol Suspensions." *Emerging Infectious Diseases Journal*, Volume 26, No. 9 – September 2020 (Early Release). https://wwwnc.cdc.gov/eid/article/26/9/20-1806_article (last accessed August 9, 2020). See also, "Predicting the Decay of SARS-CoV-2 in Airborne Particles." <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed August 9, 2020).

potentially be exposed to the virus for the remainder of the election and the vote count, and any subsequent voter would likewise be potentially exposed. Although this may be somewhat ameliorated by conducting the voting outdoors, the number of people to whom the observers and the Board agent will be exposed to over an extended period of time still presents significant risk. Further, a manual election would require a Board agent to travel approximately 60 miles at a time when travel is discouraged.

The parties do not disagree as to the number of employees in the petitioned-for unit who have been affected in some way by COVID-19, either by contracting the virus or by exposure to and subsequent quarantine or other required leave. The Employer admits that it is aware of 15 employees so affected, which is about a quarter of the entire 60-person petitioned-for unit. This is not an insignificant percentage of the unit, and, given the documented increase in cases in San Bernardino County and in Fontana in particular, it is not unreasonable to assume that the same or even greater number of employees will continue to be exposed to COVID-19 between now and a manual election and, therefore, be capable of infecting others.

Thus, taken together, I find holding a manual election at the Fontana facility under these circumstances would entail significant risk to all involved. Accordingly, I find this risk constitutes extraordinary circumstances that make a mail ballot election appropriate.

B. Disenfranchisement is a Greater Risk in a Manual Election

I acknowledge the Employer's concerns about a lower participation rate in mail ballot elections, and I agree with the Employer that absent the current pandemic, I likely would order a manual election in this case. However, I do not find that concerns regarding the potential for lower participation invalidate the extraordinary circumstance that is the basis for my decision. Moreover, I also note that conducting manual elections under the current circumstances poses a risk of disenfranchising voters.

The Board's manual election procedures do not contain an absentee or remote voting option; if a manual election is ordered, an employee must appear in person at the polls to vote. As noted above, the Employer acknowledged that a number of employees, about a quarter of the petitioned-for unit, have been unable to report to work because they contracted COVID-19 or have been exposed to or otherwise affected by the virus. Obviously, any employee currently infected or infected between now and the date of a manual election and who remained infected on the date of the election would be unable to vote. Moreover, any voter exposed to the virus or awaiting test results and subject to the recommended 14-day quarantine period would likewise be unable to vote in the election. In light of the current conditions in San Bernardino County and the number of the Employer's employees who have been affected by the virus to date, the potential for such voter disenfranchisement is real. Furthermore, during the current public health crisis, employees may be disenfranchised because they are wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation. Finally, the Employer's regular practice of taking employees' temperatures daily may raise the possibility of voters being turned away on the day of the election. I am not critical of the practice, and indeed it seems to be a conscientious effort to help identify those who could spread the virus, but it does pose concerns regarding access to the polls.

A mail ballot election would avoid the potential disenfranchisement of employees who are unable to vote because they contracted COVID-19, recently were exposed to it, or simply had a fever on the day of the election.

C. A Mail Ballot Election is Appropriate Under the Current Extraordinary Circumstances

While I do not find a manual election to be impossible, I have determined that, under the current circumstances in San Bernardino County, which – as noted above – is “experiencing elevated disease transmission and increasing hospitalizations,”³⁴ conducting a mail-ballot election is the most responsible and appropriate method of holding an election without undue delay. Admittedly, the suggested manual election protocols outlined in GC 20-10, along with the Employer’s proposed procedures for a manual election, would reduce the risk of contracting COVID-19 if exposed to it during the election. However, even assuming these protocols could adequately be enforced without disenfranchising voters or postponing or canceling the election, there is no evidence in the record or publicly available, and backed by scientific studies, to establish that following these protocols would reduce the risk to an acceptable level under current circumstances at the location where the election would take place. To the extent that the protocols would reduce the risk, I find that the remaining risk of exposure to and of contracting COVID-19 given the current conditions in the State of California and in San Bernardino County specifically still establishes the kind of “extraordinary circumstances” that make directing a mail ballot election appropriate. Moreover, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages alternative methods of voting if allowed during this extraordinary COVID-19 pandemic.

In sum, in accordance with the Board’s duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees’ union representation preference, I am directing an election in this matter as soon as practicable. To ensure the safety of all participants, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency’s obligations and responsibilities, I am directing a mail ballot election. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

³⁴ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx> (last accessed August 9, 2020). See also, “Coronavirus now spreading faster in suburbs like Orange County than in L.A. County.” (July 17, 2020) *Los Angeles Times* (“The community spread has brought other grim consequences ... in San Bernardino County, the number [of its hospitalized patients with confirmed coronavirus infection] has more than quadrupled ...,” and noting that San Bernardino County’s number of new COVID-19 cases over the preceding 14 days per 100,000 residents increased from 222 on July 1 to 408 on July 15). <https://www.latimes.com/california/story/2020-07-17/coronavirus-is-now-spreading-faster-in-the-suburbs-than-in-la-county> (last accessed August 9, 2020).

1. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³⁵
2. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties stipulated and I find that the following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time dockworkers, quality coordinators, yard hostlers, and dock trainers employed by the Employer at its Fontana, California facility.

Excluded: All other employees, drivers, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act, as amended.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 60 employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **TEAMSTERS LOCAL 63**.

A. Election Details

For the reasons I have explained above, the election will be conducted by mail.

³⁵ The Employer, Daylight Transport, LLC, a California limited liability company, with a place of business in Fontana, California, the only location in this matter, is an expedited less-than-truckload (LTL) carrier of general freight commodities. During the past 12 months, a representative period, the Employer purchased and received goods, at its Fontana, California location, valued in excess of \$50,000 directly from points outside the State of California.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **5:00 p.m. on Wednesday, August 19, 2020**. Ballots will be mailed to voters by the National Labor Relations Board, Region 31. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Wednesday, August 26, 2020**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Region 31 Office at (310) 235-7352 or our national toll-free line at (844) 762-NLRB ((844) 762-6572).

The returned ballots must be received by the Region 31 office by **5:00 p.m. on Wednesday, September 9, 2020**. All ballots will be commingled and counted by the Region 31 office at **2:00 p.m. on Friday, September 11, 2020**. In order to be valid and counted, the returned ballots must be received by the Region 31 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Saturday, August 8, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as described above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses,

available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties **Friday, August 14, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.** The Petitioner has waived its right to possess the voter list for 10 days prior to the date of the election and waives its right to file objections over this issue.³⁶

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this Decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. English and Spanish-language versions of the Notice of Election will be sent by the Region separately. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of**

³⁶ Although the Stipulation erroneously refers to the waiver in relation to "the date of the hearing," the Region has confirmed with the Petitioner that it is waiving its right to have the voter list for 10 days prior to the date of the election.

the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

//

//

//

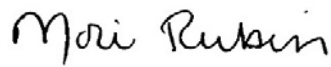
//

//

//

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Los Angeles, California this 12th day of August 2020.



Mori Rubin, Regional Director
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064-1753